IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

No. 301

D. N. HOLDEN AND LIZZIE HOLDEN, BANKRUPTS,
APPELLANTS

vs.

J. A. STRATTON, TRUSTEE,
APPELLEE

Come now the above named appellants, by their attorneys, George Turner, P. P. Carroll and John E. Carroll, and move the court for an order striking the motion of appellee to dismiss the appeal herein, and to strike his brief in support thereof for this, to-wit:

That at the time appellee served his notice and motion to dismiss he did not serve appellants with a copy of his brief or argument, nor did he serve any brief or argument more than 30 days prior to the time fixed for hearing his said motion, as required by Rule 6 of this court.

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellants.

BRIEF ON MOTION TO STRIKE.

This court, by Rule 6, has provided that "The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel resides west of the Rocky Mountains, in which case notice shall be at least thirty days." This rule was undoubtedly intended to give counsel for appellant a reasonable time in which to prepare and submit a brief in opposition to such motion Since appellee has had a year in which to make a motion to dismiss the appeal, we believe that this court will be warranted in giving a strict construction and application to Rule 6, and to grant the motion to strike on the ground that appellants are not allowed a reasonable time, as provided by Rule 6, in which to file their brief in opposition to the motion. Appellee's brief was served on April 13, 1903, and the notice, served March 21, 1903, calls his motion to dismiss for May 4, 1903.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLE'S MOTION TO DISMISS.

We will take up in order the three grounds of dismissal as assigned by appellee, to be considered in the event this court denies appellants' motion to strike.

Appellee's motion to dismiss was made after the filing and serving of appellants' brief on the merits.

His first ground for dismissal is "That no appeal lies to this court at all in this proceeding."

We submit that sections 24a and 25 of the Bankruptcy Act amply provide for our appeal, and sufficiently answer the objection made by appellee.

There is nothing in the Bankrupt Act or the General Orders of this court that denies us the right to appeal from the judgment of the Circuit Court of Appeals.

This is an equitable proceeding, and the court having the record before it, will dispose of the subject in issue, if possible.

While much of the present act is borrowed from the act of 1867, we are convinced, however, that these acts must be studied as a whole.

There is much difference between them, and you cannot take one particular section or sub-division of the act of 1867 and limit a right growing out of the present act by the construction of any particular section of the former. There are many things that can be done in the present act in the way of appeal that could not be done under the act of 1867, as for instance from an order granting or refusing a discharge to the bankrupt, which under the former statute was not appealable.

The citations on page 4 of appellee's brief do not govern in this cause, and at this time.

Appellee has some doubt as to what is meant by "claim." We do not believe the word has in law a technical meaning, consequently when the law makers used "claim" they must have had in mind the common definition of the word. In fact appellee's position seems so manifestly erroneous, we do not deem it necessary to argue further in regard thereto, except to quote the dictionary's definition of the word: and where else can this court go for its meaning? Certainly the legislature must have had

in mind the lexicographer's use of the word, and are you not bound by what Congress so clearly intended?

CLAIM (clameus, clamius, claimea, clameum, clamor, vendicato.) A challenge (or demand) by any man, of the property or ownership of a thing (or of some interest in it), which he has not in possession, but which is withholden from him unlawfully. An unascertained right to property in the possession of another. A right or title, actual or supposed, to a debt, privilege, or other thing in the possession of another. The means to an end, and not the end itself. A demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.

Burrill's Law Dictionary, Vol. 1, p. 296.

II.

"The decree appealed from was not final." Whether a decree is final and appealable is to be decided by the appellate court on a consideration of the essence of what is done by the decree.

Potter v. Beal, 50 Fed. 860.

In other words, if the lower court is given no discretion, if nothing further is to be done there except to carry out the specific directions of the higher court, which when complied with will end the controversy, it is a final judgment.

In the case at bar, the Court of Appeals in its opinion said that the policies of insurance "passed to their (appellants') respective trustees." And the district court was directed to revise its order in accordance with the opinion. Now, then, what discretion is lodged in the District Court? What else is to be done except to carry out

the specific directions of the higher court, viz: to order the policies turned over to the trustee as part of the assets of the bankrupts' estates, which when complied with must end the controversy. Appellee suggests that the District Court would have the right to hear further proof. But we submit that no such right is given in the opinion, and, furthermore, what further proof could be had, for do not the policies speak for themselves? Could any possible proof be taken that would in the least change the decree of the Court of Appeals? We say no, for there are no issues of fact involved—purely issues of law.

III.

"There are no findings under Order 36."

This rule was enacted to expedite the business of this Court. It was intended to save your honors the labor of going through long records in search of disputed facts. But in this case there are no facts in dispute. No testimony whatever has ever been taken. The record is short—in fact any statement by the Court of Appeals could hardly abridge it. The opinion (Record, pages 17-19) of the Court of Appeals sets forth all the facts that are necessary for the determination of this appeal upon the record.

Appellee says there is need of a finding as to the amount in controversy. But he himself says under oath (Record, p. 9) that in July, 1901, the value of the two policies was about $2,200.00. (See Opinion, Record, p. 18.) Certainly it would not be a less amount now. We deny that they have any "cash surrender value." But this raises purely a question of law, of what is meant by "cash surrender value," which we have fully discussed in our first brief (pp. 9-11).

In the case at bar the questions of law involved are im-

portant, and should have an early solution. Therefore this court will be warranted in overlooking the question of practice, and in determining the questions of law present- You can take the facts stated in the opinion of the court below as the established facts. Whether or not we have fully complied with the rule of this court does not affect its jurisdiction, and is no ground for dismissal of the case.

U. S. v. Adams, 6 Wallace, 101.

In re Richards, 96 Fed., 935.

If findings are necessary, this can be rectified by a remand, and without dismissing the case.

U. S. v. Adams, 6 Wallace, 101.

And should your honors deem findings essential, we respectfully move that the record be remanded to the Court of Appeals with directions accordingly.

In reviewing appellee's motion to dismiss, several points are brought to mind.

First, this court will bear in mind that here a constitutional question is involved. (See our first brief, pp. 12-14.) This point was raised in our oral argument, and in our brief, before the Court of Appeals, and we desire to press it here.

Second, the Court of Appeals was without jurisdiction to exercise its supervisory powers in this proceeding.

Section 25a of the Bankrupt Act provides:

"That appeals * * * may be taken * * * to the Circuit Court of Appeals * * * in the following cases, to-wit: * * * (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over."

Inasmuch as Congress has seen fit to prescribe by this section the method in which a judgment allowing or rejecting a claim may be reviewed, it is manifest that such judgments cannot be reviewed on an original petition filed in the Court of Appeals in the mode prescribed by subdivision "b" of section 24. It is improbable that it was the intention of the law maker to allow such a judgment to be reviewed otherwise than by appeal, and within the time expressly limited by section 25, to-wit: ten days.

In re Good, 99 Fed. 398.

Notwithstanding this, we allowed appellee to pursue the case in the Court of Appeals without objection, for we treated his proceeding as an appeal which he must afterwards have concurred in, for see the stipulation in the record, pp. 10-11, and note the word "appeal" so distinctly used.

True, his appeal was not taken within the ten days, but we desired more than anything else an expression from this court on the constitutional question here raised.

Third, that this court is "invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy, from which they have appellate jurisdiction in other cases." (Bankruptcy Act, Sec. 24a.)

Now, considering the constitutional question here involved, who can say that we have not the right to appeal?

We now lay stress upon the following, and submit to the court whether this cause should not have gone to the Circuit Court of Appeals by appeal instead of by original petition. If your honors decide that appellee should have appealed to the Circuit Court of Appeals, then your honors must find that the Court of Appeals was without

jurisdiction, because no appeal was taken within the time allowed by statute and the rules. If this is true in law, then this court is without jurisdiction, and all proceedings following the judgment of the District Court are of no effect, and the judgment of the District Court will stand.

Respectfully submitted,

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL,
Solicitors for Appellant.

18493

Supreme Court of the United States

October Term 1902

No. 301.

D. N. HOLDEN and LIZZIE HOLDEN, Bankrupts, *Appellants*,

vs.

J. A. STRATTON, Trustee.

BRIEF ON MOTION TO DISMISS

NOTICE OF MOTION TO DISMISS.

To appellants Holden, and to Messrs. George Turner, P. P. Carroll, and John E. Carroll, your solicitors:

You and each of you will please take notice that appellee will call up for hearing the annexed motion to dismiss before the above entitled court on Monday, May 4th, 1903,

at the convening of the court, or as soon thereafter as counsel can be heard.

FREDERICK BAUSMAN.
Counsel for Appellee.

Due service of foregoing notice of motion to dismiss and of within motion to dismiss acknowledged and accepted this 21st day of March, 1903.

GEORGE TURNER,
P. P. CARROLL,
JOHN E. CARROLL.
Solicitors for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 301.

D. N. HOLDEN, et al., Bankrupts,
Appellants.
vs.
J. A. STRATTON, Trustee.

MOTION TO DISMISS.

Appellee respectfully moves the court for an order dismissing the appeal on the following grounds:

1. No appeal lies to this court at all in this proceeding.

2. The judgment or decree appealed from was not a final one.

3. No findings of fact or conclusions of law, separate or at all, were found or requested of the Circuit Court of Appeals, as required by General Order in Bankruptcy No. 36 of this court.

FREDERICK BAUSMAN.
Counsel for Appellee.

BRIEF.

The bankrupts Holden were allowed to retain two life insurance policies by the district court. On original petition for revision and review, the court of appeals overruled that order, whereupon the bankrupts have appealed here.

Appellee, the trustee, will present his grounds of dismissal under the three heads assigned in the motion.

I.

No appeal lies in this proceeding.

(a)

This case did not come to the circuit court of appeals from the district court *by appeal*. It was an original petition there. It was a petition for revision and review (8, 17), under section 24 b of the bankrupt act. Now, can there be appeal to this court from a "revision and review" in the court of appeal?

Under the existing, as under the old, bankrupt act, parties aggrieved in the district court could get to the intermediate appellate court either by appeal or by petition for review. The former provided a general, the latter a particular, reconsideration, and, while the one was deliberate,

the other was summary. The following cases, from five different circuits, show that 24 b of the present act, allowing an original petition in the intermediate appellate court, was borrowed from the act of 1867. (*In re Abraham*, 93 Fed. at 783; *in re Richards*, 96 Fed., at 935; *in re Courier Journal Company*, 101 Fed., 702; *in re Worcester Co.*, 102 Fed., 808.)

"We are of the opinion that the jurisdiction conferred on the several circuit courts of appeals by subdivision 'b' of section 24 of the recent bankrupt act is the same as that which was vested in the circuit court by the bankrupt act of March 2, 1867." *In re Jacobs*, 99 Fed., at 540 (8th C. C. A.).

This being quite clear, did appeal lie to the supreme court under the old act from an adverse ruling of the circuit court "in revision and review" of the district?

This court itself has answered that in the negative. (*Morgan v. Thornhill*, 11 Wall., 65.) and that decision we believe to be conclusive here. On this ground alone the present appeal should be dismissed.

(b)

There is a second inquiry necessary whether appeal lies to this court. It is under section 25 b that such appeals are provided for in the present act, and that section allows them only from a decision "allowing or rejecting a claim." Now, what is meant by a claim? As used in that very clause, indeed, we have no adjudications, but as it occurs in the preceeding paragraph, concerning appeals, 25 a, we have. Does it include a claim *by a bankrupt?* In the case of *In re Columbia Co.*, 112 Fed., 645, the judges of the Seventh Circuit say:

"The last mentioned clause is probably applicable alone to a debt or claims against the bankrupt when presented for proof in due course."

It is apparent that the word must have either its broadest sense or a special one. Now, the broad sense would make it too comprehensive, as was attempted by a *claimant of property* alleging ownership against the trustee, (*In re Whitener,* 105 Fed., 187.)

To this it may be answered that, conceding these decisions, and the definition in the first to be correct, the present claim of exemption by the bankrupt *is* a claim against the estate. We hardly think so. What it really amounts to is an alleged right to detain the policies of insurance. It more nearly resembles a claim to hold specific property than the "claim" which the framers of the bankrupt act had in mind and which they so commonly used throughout the act, that is to say, it is very much like the erroneous "claim" in *In re Whitener, supra.* For what the bankrupts here seek to get back from the trustee, and what the district court, before reversed by the court of appeals, restored to them, was not money but the policies of insurance. (2, 3.)

More directly in point is a case from the Eighth Court of Appeals. There the bankrupt was appealing to the latter court from the district court on the very claim of insurance exemption involved here. His appeal was sought to be dismissed because not taken within the ten days allowed to appeals from "orders allowing or rejecting debts or claims." It was adjudged no debt or claim, and so not within the ten day class but within the broader appellate section 24 of the same act. If that decision be good law, then this is not a debt or claim under 25 b al-

lowing appeals to this court, and, as to appeals *to this court from the courts of appeals,* there is no other provision.

II.

The decree appealed from was not final.

The decree of the Circuit Court of Appeals, now sought to be reversed, directs (20) that the order of the district court be "revised in accordance with the opinion of this court," which is also the language of the opinion (19). This does not constitute a final decision within the scope of appellate procedure in general, and as the bankrupt act itself in providing for appeals to this court in 25 b has insisted upon a "final" decision, we see no reason why the usual rulings should not control.

It is quite plain that the district court, on receiving the mandate from the court of appeals, would still have a right, while accepting the law as decided, to hear further proof and to take other proceedings. A specific judicial act was not required of it by the court of appeals.

III.

There are no findings under Order 36.

This court has made itself pretty plain in General Order XXXVI., subdivision 3. An appeal to this court must be based on the following things done *at the time of entering* the judgment or decree: (a) A finding of facts; (b) conclusion of law, the two "stated separately," and, not satisfied with this, you prescribe that the record shall include the pleadings, the judgment or decree, and the two sets of findings. As to the manner of compliance with this rule, we presume it was your intention that courts of appeal

should in their opinions direct the prevailing party to prepare findings and conclusions which should be filed at the time of entering the formal decree on the docket.

Where have appellants sought to obtain a compliance with this rule?

The court of appeals filed a written opinion, it is true, but it hardly seems to have been the intention of this court that a mere opinion should take the place of findings and of conclusions which, beside, were to be stated separately. And there was need of findings. By the act, the amount in controversy must exceed $2000.00 or there is no appeal here. Has anybody yet fixed that amount? We, it is true, had alleged the value of the two policies at "about $2200.00" (9). The word *about* would be a defective one on which to hang pecuniary jurisdiction, either under the removal acts or in original circuit court jurisdiction, or on appeal to this court from the court of appeals. There was further need of findings. It is important here to know whether the two holders were *each* bankrupts, but has any court yet *found* that as a legal finding, undoubted though it may be in fact when the record is read?

CONCLUSION.

Should our motion to dismiss be sustained, it yet may be argued that this court may hear the controversy by *certiorari*.

Against this the trustee protests because, *first*, there is no motion pending for such a thing, none at any rate, on the 21st of March, when this motion is served (*ante*); and *second*, if such a motion were now to be made, it comes too late. (*Ayres vs. Polsdorfer*, 23 Sup. Ct. Rep., 196, Oct.

Term 1902.) The present appeal was taken in February of last year (20) and the cause docketed in the middle of the following April. We think we are entitled to the rule in the case just cited. No inclination on the part of this court to construe doubtful clauses of the bankrupt act will, we are confident, make you insensible to the rights of the trustee, a litigant entitled to all the rights of litigants yet too often coldly assisted by the courts, and in this case fighting to retain the two insurance policies which constitute *the only assets left to their creditors by bankrupts admitting an indebtedness* of $28000.00 (15-16). The trustee respectfully protests that this is not a case for indulgence to the appellants.

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.

BRIEF ON THE MERITS.

The Holdens were joint traders (13, II). When they failed and were proceeded against in involuntary bankruptcy, they scheduled liabilities of more than $28,000.00, but denied substantially that they had an asset to their names (15, 16). They acceeded to the proceedings, asked to be declared bankrupts with due discharge, and claimed any exemptions allowed by law (13, III.), *Each* of them was adjudicated a bankrupt (2, 3).

As they denied all assets, the two life insurance policies in question here were of course not disclosed, but these the trustee has discovered and seeks to retain them as a trifle, at least, for creditors. The district court ordered the policies to be surrendered to the Holdens, the court of appeals decided the reverse.

The policies were each on the husband's life in favor of the wife, with reversion in his favor on her prior demise, and the cash surrender value of both was about $2200.00 (9, III., 18).

The question now becomes a simple one, for cash surrender policies under sec. 70 a of the bankrupt act, belong to the trustee unless the Holdens can show them to be exempt. When they seek to show them exempt, it is by sec. 6 of the same act, which allows bankrupts such exemptions as may prevail in the several states. In this State of Washington that exemption is provided for by 2 Ballinger's code, sec. 5252, in these words:

"The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt."

Our subject divides itself into two heads:

I. Does section 6 make the state insurance exemption *superior to section 70 a?*

II. If it does, do the Holden policies come within that exemption.

I.

Does section 6 make the state insurance exemption superior to section 70 a?

It is useless for the writer to offer anything here. The Eighth and the Ninth Circuit Courts of Appeals have exhausted this question with contrary results, and they seem to have left nothing necessary to be said.

Steele v. Buel, 104 Fed., 968 (8th).
In re Scheld, 104 Fed., 870 (9th).
In re Holden, 114 Fed., 650 (9th).

The District Court of Maryland is in accord with the Ninth circuit.

In re Slingluff, 106 Fed., 154,

And in the Eighth circuit District Judge Shiras, before *Steele v. Buel,* was also against the state exemption.

In re Lange, 91 Fed., 361.

II.

Do the Holden policies come within the state exemption?

We are now narrowing the inquiry. We are supposing here that the state exemption paragraph of the bankrupt act does prevail over the insurance clause, and that, consequently, the Washington statute must be considered. Now, would that statute protect *both* these bankrupts? Let us see.

Each of the Holdens was adjudged a bankrupt (2, 3), *and the creditors of each are the same* (15).

The question, consequently, is not merely whether the creditors of Holden, the insured, can have the policies, or their cash surrender, but whether the creditors of Mrs. Holden, the beneficiary, can. Let us take the latter. Did the Washington law intend to protect a beneficiary from *the beneficiary's own creditors?*

Then comes a second question. Suppose the Washington statute does allow a beneficiary such exemption, did it really intend to allow *either insured or beneficiary* exemption of cash policies, that is to say, does "life insurance" in the statute mean investment policies or the investment part of policies?

These two questions we will discuss together.

We answer both of them, no. There has been only one decision in this state under that statute (*In re Heilbron's Estate,* 14 Wash., 536), and that was an attack by creditors of the *insured* against the beneficiary. This leaves the present question an open one. We must, therefore, look again at the statute, and, if that be not positive, we must look behind it to the manifest purpose of such laws, and to public policy, which is the chief source of law and which may be resorted to under our jurisprudence when precedents are not already established or statutes clear. The thing need not long be debated. While this sort of legislation has undoubtedly been stimulated by insurance companies to help their business, it has great merit. That merit consists in protecting from creditors the failing debtor's family, so that they may not feel, in one hard blow, the loss, not only of his present fortune, but also of

that mortuary fund which the ingenious law of contract has provided as a resource against despair. That in our opinion, is what they were intended to supply. If they are intended to do more, they are dishonest. If, in other words, these laws mean that I may hold a hundred thousand dollars in cash surrenderable policies, payable to myself but exempt from my creditors, they are bad, unwholesome laws. The statute of Washington, indeed, is sweeping enough to allow this sort of injustice, but until the highest court of that state so construes it, other tribunals ought not to say that this is what it means.

The true purpose of such legislation is subserved by interpreting it as protecting beneficiaries from the debts of the insured. This will protect insolvents' families. True, it happens in the present instance that the wife, being a trader, too, is a beneficiary having creditors, so that, in point of fact, this family will not enjoy the real fruits of the legislation. The instance at bar, though, is not a very common one, and it seems better, better far, to sustain our reasonable construction of this law than to interpret it so as to permit the boldest of wrongs. Nor does the schedule of the Holdens (as exhibited in this record) invite us to lenity.

It is harmful construction of the Washington law to say that it permits either the insured to make policies payable in cash to himself exempt from his debts, or a beneficiary to inherit or otherwise receive the cash results of a policy exempt from creditors of himself. Will it be contended under the Washington statute that by the death of a relative I may receive the proceeds of a large insurance policy and yet hold it secure against debts of my own, both past and future?

As to beneficiaries Iowa furnishes a just construction of such laws. There the statute provides that "the avails of any life insurance are not subject to the debts of the deceased." Now, what deceased? *Murray v. Wells,* 53 Iowa, 256, 5 N. W. 182, is a case as follows. The husband insured himself for the benefit of his wife, but the wife died and her heirs assigned their rights under the policy to T. H. W., a son, who also died. The father, the insured, was still living. Now, the dead son's representatives had obtained a paid up policy. Was this subject to his debts? The statute said "debts of the deceased," but the court held that this meant debts of the deceased *insured.* A similar spirit of construction against beneficiaries is shown in *Reighart v. Harris,* 51 Pac., 788, 6 Kans. App., 339.

This throws us back again to scan the statute. Its language, we concede, is broad enough to protect a life insurance inheritance from the *beneficiary's own creditors.* But if it is broad enough for that, it is broad enough for something equally unnecessary and more mischievous. We mean that it is then broad enough to protect from creditors of the *insured* a policy (or "bond," as now called), payable in cash to the insured debtor himself. There is no avoiding this disastrous conclusion. "The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt." If this means that creditors *of the wife,* the beneficiary, may not touch her property because it came of life insurance, that creditors of a beneficiary nephew or child may not, it means also that creditors of the insured may not, even as against the debtor, when he gets the proceeds or avails in his own lifetime. This last is intolerable. It actually would permit a failing debtor, foreseeing his collapse, to invest a large

sum in one of these cash surrender bonds, payable to himself. It would manifestly encourage him to do so. Another illustration. A debtor might keep his wife's life insured payable to *him*, and put it on a cash surrender basis. Then he fails and walks the streets with an ample fund secure. Equally would such doctrine permit elderly relatives to endow insolvent nephews or sons with large amounts of cash available to no creditor of either of them.

To what, then, do we come? That the Washington statute, whether passed to promote the insurance business or at the instance of debtors, is so sweeping as, if taken literally, to conflict with the manifest intention of the bankrupt act and of public policy. If the last be thought too vague a thing, then let us resort to construction of the statute according to the usual standards. What did "life insurance" probably mean to the members of the local legislature? What does "the proceeds of life insurance" mean to the average man? Is it not a fund realizable by death? Is it not a species of inheritance?

As to the endowment features we find in Nebraska a full discussion of how such policies differ from insurance. Kent's definition of life insurance is there adopted "a contract to pay a certain sum upon the death of the person whose life is insured." *Talcott v. Field*, 52 N. W., 400, 34 Neb., 611.

The cash surrender features are always an afterthought in the popular acceptation of life insurance. Notice here the words of the statute. It does not say "the proceeds or avails of any life insurance *policy*," but merely of *life insurance*. Now, it is well known that not only in common parlance does life insurance mean simply insurance on one for the benefit of another after death, but in insurance

language the endowment feature is totally distinct from the insurance feature. The endowment is a superadded thing, a creation of more recent times, separately calculated. In view of the many statutes of this kind fostered by insurance companies throughout the country, it is not illiberal, we think, to ask that they be construed as such phraseology is commonly understood and even technically applied in that science or business.

We conclude that (a) the Washington statute never meant to save beneficiaries from their creditors; (b) even if it did, it meant only cases of "insurance" proper.

If it be said that the interest of the Holdens in these policies is joint, let it be remembered that they have the same creditors and the same assignee to make surrender.

Respectfully submitted.

FREDERICK BAUSMAN,
Counsel for Appellee.

ADDENDA.

On Motion to Dismiss.

We have just learned that appellants have sought to cure this defective appeal by a certificate from Mr. Justice McKenna obtained almost simultaneously with the service of our motion. Does the certificate, however, mend the matter? We think not.

(a) This certificate under the bankrupt act is not, to be sure, a proceeding in certiorari, or subject to such rules, so our citation of *Ayres v. Polsdorffer* is not now in point. But "certificate" in connection with "question," as it is a phrase long used in federal appellate practice, must have been intended to come within some existing class or other. To us it seems to be only another form of the certificate required on direct appeal from the circuit court to the supreme. That requirement, existing before the court of appeals act, was imported into the latter, and, when imported, was always held to mean in the new act what it meant in the old. By numerous decisions of this court it had to present a precise question or questions not involving a study of the whole record. Moreover, it had to be signed *at the same term* at which the decision appealed from was rendered. If the bankrupt act has in turn been a borrower of this phrase, we should have no doubt of its taking it with its usual meaning, and judged by that, this certificate, signed long after the term and formulating no definite questions, is defective.

(b) By your General Order XXXVI it is provided that appeals must be taken within thirty days. If this appeal was not a good appeal without a certificate, we hardly think it ought to be made a good appeal by a certificate issued more than a year afterwards (January 16, 1902, and March 20, 1903, are the respective dates). The practice under this bankruptcy appeal provision is yet to be settled. The certificate may, on the one hand, be construed as a very general sort of cure-all subject to little rule. It may, on the other hand, be regarded as another kind of certiorari saving form, notice, and expense of application, besides being obtainable in vacation. But under whichever head it falls (in our opinion the latter), it surely is subject to some limitations of time, if not also of form. The adverse party has a right to know early where he stands and not to be kept wondering whether the appellant will try to mend matters by a certificate or whether the court will grant a certificate even if applied for. The true way to look at it is this. The certificate should be obtained as a *basis* for appeal. Manifestly it cannot of itself operate as a transfer of the cause. Nobody would claim that. The usual order allowing appeal has to be signed by some judge before the clerk may transmit the record. If, therefore, it is intended to be a basis for appeal, it must be reasonably precise and within time.

The fault here lies with counsel who prepare such defective papers, as judges must usually be expected to sign them for what they are worth, and we do not think counsel should be allowed to amend this appeal by a step so tardy and informal as this.

(c) We have occasion to recur again to the need of findings. In appellant's brief, now received, we find a controversy raised as to whether these policies do have a cash surrender value. This we thought settled. If it is not settled, findings are necessary. But there are here no findings, and, under your Order XXXVI, how can you, or should you, proceed without them?

ON THE MERITS.

There are a great many cases touching the rights of beneficiaries as against creditors of either the insured or the beneficiary but a study of them is scarcely profitable here, for this is plainly a case of statutory construction. To those cited in the original part of this brief, we may add *Yale v. McLaurin*, 66 Miss. 461. There the statutory words exempted the insurance from the debts "of the person paying the premium." Now, the *beneficiary* paid the premium in that instance, and it surely was plausible to say that the letter of the statute saved the insurance from his debts, but the court held that the purpose of the law was manifest enough to prevail over this literal construction. In Minnesota, the court went further. It there decided (*How vs. How*, 59 Minn. 415, 61 N. W. 456) that a statute exempting insurance without limit of amount was unconstitutional as violating the Minnesota constitution, which empowered the legislature to exempt "a reasonable amount of property." The statute, it was held, would permit unreasonable amounts to be exempted in the form of life insurance. That decision is applicable here, we think, for our Washington constitution (Art. XIX, 2 Balling,

p. 848) has indicated restrictions. "The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." Whether Mrs. Holden is the head of a family within this is doubtful, but, passing that, what is meant by "a certain portion?" It must mean what the Minnesota constitution meant, reasonable.

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.